Office - Supreme Court, U. S.
FILED
APR 22 1942

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1164

MYRTLE A. GARNER,

Petitioner,

vs.

GEORGE ALEXANDER.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON.

JOSEPH A. RONEY,
S. L. STAATS,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
I. Statement of the case	1
II. Basis of jurisdiction	3
III. Statutes involved	3
IV. Specification of errors	4
1. The Supreme Court erred in holding that the trial Court had plenary jurisdiction of the offense committed by the petitioner	4
2. The Supreme Court erred in denying petitioner's motion to dismiss defendant-warden's appeal	5
3. The Supreme Court erred in ordering the lower court to remand petitioner to the custody of the warden of the Oregon State Penitentiary	5
V. Reasons relied on for the granting of the writ	5
VI. Appendix	10

Table of Cases Cited.

Breslin v. *Lawrence*, 107 N. Y. 607	7
Ex Parte Bruegger, etc., 204 Cal. 169	8
Ex Parte C. M. Cox, 44 Fla. 537	8
Ex Parte Jilz, 64 Mo. 205	8
Ex Parte Melburn, 34 U. S. (9 Pet.) 704	8
Ex Parte Virginia, 100 U. S. 339, 349	7
Glasser v. *U. S.*, Vol. 86, Supreme Court Law Ed. Advance Opinions 405	6
Gibson v. *Mississippi*, 162 U. S. 565	7
Gibson v. *Ogden*, 9 Wheat, 1	6
Hebert v. *Louisiana*, 272 U. S. 321	6
Herndon v. *Lowry*, 301 U. S. 242	5
In Re Murphy's Estate, 57 Mont. 273	7
In Re Muskogee Gas & Elec. Co., 83 Okla. 167	7
In the Matter of Dick Williams, 149 N. C. 436	8
Lowry v. *Rainwater*, 70 Mo. 152	8

Page

Moore v. *Dempsey*, 261 U. S. 86 6
Nashville v. *Cooper*, 6 Wall. 347 6
Neal v. *Delaware*, 103 U. S. 370 7
Penn Mutual Life Ins. Co. v. *Creighton*, 51 Neb. 659 7
Pugmire, et al. v. *Diamond Coal & Coke Co.*, 26 Utah 115 . 7
Re Ginn, 2 N. Y. App. 103, 104 7
Smith v. *Texas*, 311 U. S. 128 6
State v. *Lowry, et al.*, 143 Ala. 48 8
Vaughn v. *Congdon*, 56 Vt. 111 8

STATUTES CITED.

Church on Habeas Corpus, page 386 8
Oregon Compiled Laws Annotated 3
11–428 3,5
11–443 3,5,7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1164

MYRTLE A. GARNER,

Petitioner,

vs.

GEORGE ALEXANDER.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON.

To the Honorable Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

I.

Statement of the Case.

Your petitioner, Myrtle A. Garner, respectfully shows:

Petitioner was indicted September 9, 1939, in the Circuit Court for Curry County, Oregon, for the crime of larceny of live stock. She was convicted by a jury of Curry County, Oregon, at the September, 1939, term of said Court, and sentenced to a term in the Oregon State Penitentiary at Salem, Marion County, Oregon This conviction was appealed to the Supreme Court of Oregon, that being the

highest court in said state wherein a decision could be had, and on December 17, 1940, said conviction was affirmed. Petition for rehearing was denied February 11, 1941.

On March 19, 1941, petitioner then confined in said Penitentiary, filed in the Circuit Court of Marion County, Oregon, her petition for writ of habeas corpus (R. 3) alleging that the County Judge, County Court, County Sheriff and County Clerk of Curry County, Oregon, whose constitutional and statutory duty it was to select a jury list from all of the qualified voters in said county and state, did, for the September, 1939, term of court in Curry County, Oregon, purposely exclude women's names from the jury-list, from which jury-list the grand-jury were drawn that indicted, and the trial-jury were drawn that convicted petitioner (R. 7), and in support of such contention this petitioner produced affidavits of the County Judge, County Sheriff and County Clerk of Curry County, Oregon (see appendix), to the effect "there has never been a serious attempt to place women upon the jury-list in Curry County until January, 1940", and that "in January of 1939", at which time petitioner was indicted, tried and convicted in Curry County, Oregon, "women's names were purposely left off the jury-list" (R. 20), and there was no contradiction of this testimony.

Based thereon, the Circuit Court of Marion County, Oregon, on June 6, 1941, after considering the case, entered an "Order To Discharge Prisoner" (R. 18), and from that Order, the defendant-warden appealed said cause to the Supreme Court of Oregon (R. 1).

On December 23, 1941, the Supreme Court of Oregon rendered its decision and reversed the lower court, and ordered that "The order of the circuit court releasing the petitioner, Myrtle A. Garner, is hereby reversed, and the cause is remanded to that court with instructions to set aside its order and remand Myrtle A. Garner to the cus-

tody of the warden of the Oregon State Penitentiary" (R. 26).

II.

Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. 344 (b).

The Supreme Court of Oregon is the highest court of Oregon in which a decision in this case could be had. The decision sought to be reviewed was entered December 23, 1941, and on March 21, 1942, an extension of time was granted to petitioner by Mr. Justice Douglas to and including April 22, 1942 (R. 29). Therefore, this petition is timely filed for a writ of certiorari.

The decision herein of the Supreme Court of Oregon is a final judgment.

III.

Statutes Involved.

11-443—Oregon Compiled Laws Annotated—

> "Any party to a proceeding by habeas corpus, including the state when the District Attorney appears therein, may appeal from the judgment of the circuit or county court refusing to allow such writ, or any final judgment therein, either in term or vacation, in like manner and with like effect as in an action. No question once finally determined upon a proceeding by habeas corpus shall be re-examined upon another or subsequent proceeding of the same kind."

11-428—Oregon Compiled Laws Annotated, Oregon Code (1930) 8-428.

> "No person who has been finally discharged upon a proceeding by habeas corpus, pursuant to the provi-

sions of this chapter, shall be again imprisoned, restrained, or kept in custody for the same cause; but it is not to be deemed the same cause,

(1) If he has been discharged from a commitment on a criminal charge, and be afterwards committed for the same offense by the legal order or process of the court wherein he is bound by recognizance or undertaking to appear, or in which he is indicted or convicted for the same offense.

(2) If, after a judgment of discharge for a defect of evidence, or for a material defect in the commitment in a criminal case, the party be again arrested on sufficient evidence and committed by legal process for the same offense.

(3) * * *.

(4) * * *."

IV.

Specification of Errors.

1. The Supreme Court of Oregon erred in holding that the trial Court "had plenary jurisdiction of the offense committed by the petitioner" (R. 23), because the County Judge, County Sheriff and County Clerk of Curry County, Oregon, whose constitutional and statutory duty it was to select a jury-list from all of the qualified voters in the County, purposely excluded women from the jury-list for the September, 1939, term of Court (R. 1) which constitutes a direct denial of the equal protection of the laws of Oregon to this petitioner guaranteed her by the Constitution of the United States and laws of Oregon, and no Court can be said to have "plenary jurisdiction" in a criminal case sufficient to hear and determine a cause and the right and power to pronounce a sentence of the law until it has acquired jurisdiction through due process of

law, and, whatever the constitution and laws of a state prescribe is essential to the Court's jurisdiction in the prosecution of crime, neither can be waived nor omitted.

2. The Supreme Court of Oregon erred in denying petitioner's Motion to Dismiss the defendant-warden's appeal (R. 19), because the laws of Oregon, 8-443 Ore. Code 1930, 11-443 O. C. L. A. (see page 3) do not authorize the defendant-warden of the Oregon State Penitentiary to take an appeal from the lower court's order discharging this petitioner from said Penitentiary (R. 1). Such holding by the Supreme Court of Oregon constitutes a direct denial of the equal protection of the laws of Oregon to petitioner and denies her her liberty without due process of law, all guaranteed her by the Constitution of the United States.

3. The Supreme Court of Oregon erred in remanding petitioner, Myrtle A. Garner, to the custody of the warden of the Oregon State Penitentiary (R. 25), because, under the laws of Oregon 11-428 O. C. L. A. (see page 3), a person once discharged by habeas corpus proceedings cannot again be imprisoned or restrained of his liberty for the same cause. Such holding by the Supreme Court of Oregon constitutes a direct denial to this petitioner of her liberty without due process of law and of the equal protection of the laws of Oregon, all guaranteed her by the 14th Amendment to the Constitution of the United States.

V.

Reasons Relied On for the Granting of the Writ.

This Court has jurisdiction to review the constitutional questions presented at the habeas corpus proceedings, even though the habeas corpus proceedings are local in scope. *Herndon* v. *Lowry*, 301 U. S. 242.

This Court has jurisdiction to review the constitutional questions presented at the habeas corpus proceedings, even though the denial of constitutional rights was not asserted in the original proceedings. *Moore* v. *Dempsey*, 261 U. S. 86.

A federal question arises whenever the decision of the State Court depends upon the right construction of a statute where is involved personal liberty. *Nashville* v. *Cooper*, 6 Wall. 347.

The due process clause of the 14th Amendment to the Federal Constitution does not make the statutes of the several states the absolute test of what it requires. *Hebert* v. *Louisiana*, 272 U. S. 321.

The Supreme Court will take jurisdiction and inquire whether or not the laws of the State and the effect thereof as expounded by the highest tribunal of that State, have, in their application to the instant case, come into collision with the Federal Constitution and thereby deprived petitioner of her liberty without due process of law and of the equal protection of the laws. *Gibson* v. *Ogden*, 9 Wheat. 1.

The exclusion of the members of petitioner's own sex from the jury-list denied her due process and equal protection of the law under the Constitution of the United States and the constitution and the laws of the State of Oregon. *Glasser* v. *U. S.*, Vol. 86, No. 6, Supreme Court Law Ed. Advance Opinions, Page 405, decided January 19, 1942.

The exclusion of women from the jury-list denied to the petitioner the constitutional right of a trial by a jury truly representative of the community. *Glasser* v. *U. S. supra; Smith* v. *Texas*, 311 U. S. 128.

A jury not organized in accordance with the statute is an unlawful jury, and in support of a challenge thereto it is not necessary to show that the members of the jury are not qualified jurors, and is a direct denial to petitioner of

the equal protection of the laws of Oregon, all guaranteed her by the Constitution of the United States.

Ex Parte Virginia, 100 U. S. 339, 349.

The exclusion of women by the County Judge, County Sheriff, and County Clerk of Curry County, Oregon, from the jury-list from which the grand-jury that found, and the trial-jury that was summoned to try, the indictment, was without authority derived from the Constitution and laws of the State of Oregon and was a direct violation of petitioner's rights under the Constitution and laws of the United States. *Neal* v. *Delaware*, 103 U. S. 370; *Gibson* v. *Mississippi*, 162 U. S. 565.

It will be noted that statute (11-443 O. C. L. A.) (see page 3) provides for an appeal in a case where the lower Court REFUSES TO ALLOW SUCH WRIT, and in the case at bar the Court below did not refuse to allow such writ but did ALLOW SUCH WRIT and therefore, the defendant-warden of the Oregon State Penitentiary, did not have the right of appeal under said statute and the holding of the Supreme Court of Oregon denying petitioner's motion to dismiss defendant-warden's appeal constitutes a direct denial to petitioner of the equal protection of the laws of Oregon, all guaranteed her by the Constitution of the United States.

The interest in the subject-matter which will authorize an appeal must be a direct and pecuniary interest in the subject-matter of the particular case. The defendant-warden of the Oregon State penitentiary had no such interest. *Re. Ginn*, 2 N. Y. App. 103, 104; *The People ex rel. James Breslin, Respondent*, v. *Abraham R. Lawrence, Justice of the Supreme Court, Appellant*, 107 N. Y. 607; *In Re Murphy's Estate*, 57 Mont. 273; *In Re Muskogee Gas & Electric Co.*, 83 Okl. 167; *Pugmire, et al.*, v. *Diamond Coal & Coke Co.*, 26 Utah, 115; *Penn Mutual Life Ins. Co.* v. *Creighton, etc.*, 51 Neb. 659.

The decided weight of authority is to the effect that in the absence of statutory provision, a judgment in habeas corpus proceedings discharging a prisoner cannot be reviewed on appeal or writ of error proceedings. *Ex Parte C. M. Cox*, 44 Fla. 537; In the *matter of Dick Williams*, 149 N. C. 436; *Ex Parte Bruegger, etc.*, 204 Cal. 169; *State* v. *Lowery, et al.*, 143 Ala. 48.

Jurisdiction of the lower Court in order to be complete, must be of the process, the person, and the subject-matter acquired through due process of law. *Vaughn* v. *Congdon*, 56 Vt. 111; *Lowry* v. *Rainwater*, 70 Mo. 152.

No person who has been finally discharged upon a proceeding by habeas corpus, pursuant to Section 11-428 O. C. L. A., shall be again imprisoned, restrained, or kept in custody for the same cause; *Church, habeas corpus*, 386, *Ex Parte Jilz*, 64 Mo. 205.

The discharge of a party under a writ of habeas corpus from the proceedings of which he is imprisoned, discharges him from any further confinement under the same, but not from arrest under other legal process which may issue against him for the same offense. *Ex Parte Melburn*, 34 U. S. (9 Pet.) 704.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Court, directed to the Chief Justice, and to the Associate Justices of the Supreme Court of the State of Oregon, commanding them and each of them to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and proceedings of the said Supreme Court of Oregon in the case lately pending therein entitled Myrtle A. Garner, Respondent, v. George Alexander, Appellant, to the end that the Judgment of said Supreme Court of Oregon in said case may be reversed as by statute in such cases made and provided,

and that your petitioner may have such other and further relief and remedy in the premises as to this Court may seem appropriate and in conformity with the law.

Dated this — day of April, 1942.

JOSEPH A. RONEY,
S. L. STAATS,
Counsel for Petitioner.

APPENDIX.

AFFIDAVITS.

STATE OF OREGON,
County of Curry, ss.:

I, A. H. Boice, being first duly sworn, on oath do depose and say that I am the duly qualified and acting County Judge of Curry County, Oregon, and have held office as Judge since January of 1937. For two years prior to that time I was the County Commissioner. During my incumbency as County Commissioner and County Judge there has never been a serious attempt to place women upon the jury of Curry County until January of 1940. In January of 1939, women's names were purposely left off the jury list. The reason for such action being that the few women that had been called had claimed their exemption and the County Court felt that the facilities at the Court House for women jurors was inadequate.

(Signed) A. H. BOICE,
County Judge of Curry County.

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 30th day of December, 1940.

(Signed) J. S. MOLTZNER,
Notary Public for the State of Oregon. (Seal)

My Commission expires: 4/30/44.

Petitioner's Ex. No. 1.—Ferguson.

Affidavit of Oleta A. Walker, County Clerk of Curry County, Oregon, for the year 1939, and entered in evidence in the Court below (Tr. ev. 88) (Garner 8) reads as follows:

STATE OF OREGON,
County of Curry, ss.:

I, Oleta Walker, being first duly sworn on oath do depose and say: I am the duly elected, qualified and acting Clerk of Curry County, Oregon, and as such have custody and

keep the records of the County and Circuit Courts of Curry County, Oregon; that the records of the County Court as shown by the Journal of said Court for the session of said Court held on the 3rd day of January, 1939, contains the names and addresses of the jury list for the year 1939 as made up by the County Judge and Commissioners; that there are no names of women on said list and no women were notified by me to present themselves for jury duty or claim their exemption from said jury service; that the records of the County Court for the session held January 3rd, 1938, contains the names of 5 women; the records for the session held January 2nd, 1937, contains the names of 6 women called for jury service; the records for the session held January 2nd, 1936, contains the names of five women summoned for jury service; that for the last four years to and including 1939, no women have served on any Circuit Court jury; that prior to January of 1940 the only women notified to serve as jurors were those who had previously refused to serve and no attempt was made to procure other or different women and almost the identical names were placed on the jury list for the years 1936 to 1939, inclusive.

(Signed) OLETA A. WALKER,
County Clerk of Curry County, Oregon.

Subscribed and sworn to before me a Notary Public in and for said County and State this 26th day of December, 1940.

(Signed) J. S. MOLTZNER,
Notary Public for Oregon. (Seal)

My commission expires Apr. 30, 1944.

Petitioner's Ex. No. 2—Ferguson.

Affidavit of F. W. Smith, Sheriff of Curry County, Oregon, for the year 1939, and entered in evidence in the Court below (Tr. Ex. 8) (Garner 8), reads as follows:

STATE OF OREGON,
County of Curry, ss.:

I, F. W. Smith, being first duly sworn, on oath, do depose and say that I am the Sheriff of Curry County, Oregon;

that for the year 1939 there were no names of women placed on the jury list for call to serve as jurors for the Grand Jury or Circuit Court Jury; that in 1938, 5 women were listed for jury service; for the year 1937, 6 women were listed and for the year 1936, 5 women were listed. That at no time since 1933 until 1940 were women actually placed on juries in the Circuit Court of Curry County or called for service on the Grand Jury.

(Signed) F. W. SMITH,
Sheriff of Curry County, Oregon.

Subscribed and sworn to before me a Notary Public in and for said County and State this 26th day of December, 1940.

(Signed) J. S. MOLTZNER,
Notary Public for Oregon. (Seal.)

My commission expires Apr. 30, 1944.

Petitioner's Ex. No. 3—Ferguson.

Office - Supreme Court, U. S.
FILED
MAY 11 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1164

MYRTLE A. GARNER, Petitioner,

vs.

GEORGE ALEXANDER

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

I. H. VAN WINKLE,
Attorney-General of Oregon,
WILLIS S. MOORE,
Assistant Attorney-General of Oregon,
Counsel for Respondent.

JOSEPH A. RONEY,
S. L. STAATS,
Counsel for Petitioner.

TABLE OF CASES CITED

PAGE

Andrews v. Swartz, 156 U. S. 272; 39 L. ed. 422 2

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 680; 74 L. ed. 1107, 1113 2

Ex parte Wilson, 140 U. S. 575, 582; 35 L. ed. 513, 517 2

Herndon v. Lowry, 301 U. S. 242, 247; 81 L. ed. 1066, 1069 3

Jugiro v. Brush, 140 U. S. 291, 293, 297; 35 L. ed. 510, 511, 513 2

Keizo v. Henry, 211 U. S. 146; 53 L. ed. 125 2

Knights of Pythias v. Meyer, 265 U. S. 30, 32; 68 L. ed. 885, 888 2

Rogers v. Peck, 199 U. S. 425; 50 L. ed. 256 2

Senn v. Tile Layers Protective Association, Local No. 5, 301 U. S. 468, 477, 81 L. ed. 1229, 1235 3

United States v. Gale, 109 U. S. 65; 27 L. ed. 65 2

TABLE OF STATUTES CITED

PAGE

OREGON COMPILED LAWS ANNOTATED:

Section 11-415 3

Section 11-428 ..... 2, 3

Section 11-443 2

PAGE

Official report of the opinion delivered in Supreme Court of Oregon, 120 Pac. (2d) 238 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1164

MYRTLE A. GARNER, Petitioner,

vs.

GEORGE ALEXANDER

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

The opinion in the Supreme Court of Oregon is reported in 120 Pac. (2d Series) 238.

The petition for writ of certiorari should be denied for the following reasons:

1. The petition does not present a cause in which is drawn in question the validity of a treaty or statute of the United States, or where is drawn in question the validity of a statute of the state of Oregon on the ground of its being repugnant to the Constitution, treaties or laws of the United States.

The decision of the Supreme Court of Oregon as to the rights and privileges claimed by petitioner under the Constitution of the United States does not present a Federal question of substance not heretofore determined by this Court, nor decided in a way probably not in accord with applicable decisions of this Court. (R. 3 to 10.)

Jugiro v. Brush, 140 U. S. 291, 293, 297; 35 L. ed. 510, 511, 513.
Keizo v. Henry, 211 U. S. 146; 53 L. ed. 125.
Rogers v. Peck, 199 U. S. 425; 50 L. ed. 256.
Andrews v. Swartz, 156 U. S. 272; 39 L. ed. 422.
Ex parte Wilson, 140 U. S. 575, 582; 35 L. ed. 513, 517.
United States v. Gale, 109 U. S. 63; 27 L. ed. 857.

2. In denying petitioner's motion to dismiss appeal from the Circuit Court of Oregon to the Supreme Court of Oregon the Court construed section 11-443, O. C. L. A., to permit the warden of the Oregon state penitentiary to take such appeal (R. 19). Its decision in that regard does not present a Federal question and is not subject to review by this Court.

Knights of Pythias v. Meyer, 265 U. S. 30, 32; 68 L. ed. 885, 888.
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 680; 74 L. ed. 1107, 1113.

3. Section 11-428, O. C. L. A., as construed by the Supreme Court of Oregon, has no application to appeals from the Circuit Court of Oregon to that Court.

The discharge of the petitioner by the Circuit Court was not final, but subject to review by the Supreme

Court of Oregon, and the final order of the Circuit Court remanding petitioner to the penitentiary was entered pursuant to mandate of the Supreme Court. (R. 25, 26.)

Section 11-415, O. C. L. A., provides:

"It shall be the duty of the court or judge forthwith to remand such party if it shall appear that he is legally detained in custody, either:

* * * * *

"(2) By virtue of the judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree; or,

* * * * *

"(4) That the time during which such party may be legally detained has not expired."

Neither section 11-415 nor section 11-428, O. C. L. A., is in conflict with the Federal Constitution. The decision of the Supreme Court of Oregon as to their meaning is conclusive upon this Court.

Herndon v. Lowry, 301 U. S. 242, 247; 81 L. ed. 1066, 1069.

Senn v. Tile Layers Protective Association, Local No. 5, 301 U. S. 468, 477, 81 L. ed. 1229, 1235.

I. H. VAN WINKLE,
Attorney-General of Oregon,

WILLIS S. MOORE,
Assistant Attorney-General
of Oregon,

(Address: Supreme Court Bldg.,
Salem, Oregon.)

Counsel for Respondent.